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No. 82-31

IN THE

Supreme Court of the United States

October Term, 1982

HORMOZ SABET,

Petitioner,

— against —

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: August 3, 1982

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PRELIMINARY STATEMENT

Respondent American Express International Banking Corporation ("AEIBC") submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Hormoz Sabet.

STATEMENT OF THE CASE

Proceedings in the District Court

This action was brought by AEIBC in July of 1979 for amounts due on three promissory notes dated September 26, 1977, December 9, 1977 and January 28, 1978 (the "Notes"), which were executed by Habib Sabet, Iradj Sabet and the petitioner, Hormoz Sabet.[1] The Notes were issued under and entitled to the benefits of a loan agreement dated December 9, 1977 (the "Loan Agreement") which was also executed by each of the Sabets.

In connection with the loans, Hormoz and Iradj Sabet also executed individual unconditional guaranties of all obligations of

1. The action was commenced in the New York State Supreme Court by motion for summary judgment in lieu of complaint on the Notes and Guaranties, and was subsequently removed by the Sabets to the United States District Court for the Southern District of New York.

Habib Sabet to AEIBC (the "Guaranties"). As further security for the three loans, Firooz Corporation ("Firooz") and Iramoz Corporation ("Iramoz"), two companies in which the Sabets had business and financial interests, pledged to AEIBC 150,000 shares of the capital stock of the Industrial Mining and Development Bank of Iran (the "Pledged Shares").[2]

It has never been disputed that the Sabets were the primary obligors on the Notes, or that the Pledged Shares were owned by Firooz and Iramoz, who were not parties to the Notes. Nor has it been disputed that the loan documents upon which this action is brought are authentic, that the loans have been in default since at least January 3, 1979, that upon default AEIBC had the right to, and did, accelerate the Notes and call upon the Guaranties, or that the aggregate sum of $3,880,574.24 was due and owing as of November 5, 1980, and that interest continues to accrue thereon.

At the outset of this action petitioner alleged that he had not been served with process; nevertheless, he took the leading role in the Sabets' defense to AEIBC's action. On two occasions he submitted affidavits setting forth various defenses and counterclaims, including the collateral-related defenses under the New York Uniform Commercial Code which he now brings before this Court. In an Opinion and Order dated August 29, 1980, Judge Conner rejected these and all other alleged defenses to liability and granted AEIBC summary judgment against petitioner's co-defendants Habib and Iradj Sabet. *American Express International Banking Corporation v. Sabet*, 512 F. Supp. 463 (S.D.N.Y. 1980).[3]

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2. Firooz also executed an unconditional corporate guaranty of the Sabets' obligations.

3. Habib and Iradj Sabet subsequently appealed the judgment against them to the United States Court of Appeals for the Second Circuit, raising, *inter alia*, the same commercial law issues petitioner now brings before this Court. The Second Circuit summarily affirmed. For the convenience of this Court, the Second Circuit's opinion, which was not reported, is set forth in Appendix A, *infra* at A-1, *et seq.*

Apparently concerned that, notwithstanding his defense on the merits and the affidavit of a professional process server submitted by AEIBC, petitioner might have "failed to recall service in this action", Judge Conner granted summary judgment against petitioner unless he submitted an affidavit specifically denying service (P. B-56, 512 F. Supp. at 471).[4] Upon petitioner's submission of such an affidavit the matter was referred by Judge Conner to United States Magistrate Ruth Washington for a hearing.

Proceedings Relating to Service of Process

Magistrate Washington heard evidence at two hearings conducted on October 8 and October 31, 1980 on the question of whether AEIBC had effected service of process on petitioner. Among others, the Magistrate heard the testimony of the professional process server, the petitioner and petitioner's attorney, Mark Lebow ("Lebow").

At the commencement of the hearings Magistrate Washington asked counsel whether they wanted a stenographic transcript of the proceedings made. Counsel for both parties declined the opportunity to have such a transcript made. Magistrate Washington then informed the parties that she would be tape recording the hearings for her own use (P. B-2).

On February 10, 1981, the Magistrate issued her Report and Recommendation in which she concluded that Sabet had been personally served by AEIBC (P. B-5). The Magistrate noted that the question of personal service amounted to a credibility determination between the conflicting testimony of the process server and petitioner. Her considered opinion was that petitioner's testimony was incredible. The Report stated that the

4. The District Court's opinions, its Statement on Remand from the Court of Appeals, the Report and Recommmendation of the United States Magistrate and the opinions of the Court of Appeals are set forth in Appendices A and B to the Petition. References herein to "(P. A-__)" and "(P. B-__)" are to such appendices.

process server's "oral testimony in general was credible and, combined with his affidavit of service substantiates plaintiff's position of having personally served defendant Hormoz Sabet . . . despite Mr. Sabet's . . . testimony" (P. B-9).

Petitioner subsequently filed an objection to the Magistrate's finding that he had been personally served and requested that Judge Conner conduct a *de novo* review of the issue or, alternatively, rehear the evidence himself. Although the substance of his objections was that the Magistrate's decision misconstrued testimony and generally did not comport with the weight of the evidence adduced, petitioner at no time advised Judge Conner that a taped record of the proceedings existed or requested that he review the tape. Rather, on February 25, 1981, petitioner submitted to the District Court his own affidavit and the affidavit of Lebow, together with a letter of counsel which stated that the affidavits *"set forth the substance of what was testified to with respect to the issue of personal service"* (B-1).[5] In the letter petitioner's counsel suggested that the District Court use the affidavits as the basis for its *de novo* determination *"in the event the Court does not wish to take oral testimony"* (B-2).

In an Opinion and Order dated April 6, 1981, Judge Conner fully adopted the Magistrate's proposed finding that petitioner had been personally served (P. B-17).[6] Judge Conner concluded that:

> [the Magistrate's] proposed finding that [the process server's] testimony, as bolstered by his contemporaneous records, was more worthy of belief than the testimony of Sabet, an obviously interested party, whose version of events was only partially supported by the testimony of [Lebow], appears wholly reliable.

(P. B-24, 512 F. Supp. at 474).

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5. The text of the transmittal letter accompanying petitioner's affidavits is set forth as Appendix B, *infra*, at B-1, *et seq.*

6. *American Express International Banking Corporation v.Sabet*, 512 F. Supp. 472 (S.D.N.Y. 1981).

This conclusion was based in large part on the fact that the Magistrate had given credence to the process server's testimony "after having an opportunity to observe [his] demeanor under direct and cross-examination" (P. B-22, *id.*).

Moreover, the opinion makes clear that in making his *de novo* determination of the service issue, Judge Conner gave full consideration to the affidavits submitted by petitioner. The court determined, however, that the affidavits did not "alter the reliability of the Magistrate's proposed findings." (P. B-24, *id.*) In particular, it pointed out that petitioner's statements were self-serving and that Lebow's statements were not inconsistent with the process server's more credible version of the events (P. B-24-25, *id.*)

Having found that petitioner had been personally served, on April 15, 1981, the District Court entered a judgment against him, which petitioner appealed to the United States Court of Appeals for the Second Circuit.

Proceedings Before the Court of Appeals

In his brief to the Court of Appeals, petitioner alleged for the first time that the review he had sought and received from the District Court was inadequate. Contradicting his express representations to Judge Conner, he now argued that the District Court was required to either review a transcript of the proceedings (which petitioner had waived) or hear the evidence anew. Conspicuously absent from petitioner's brief was any explanation for his failure to have requested that Judge Conner review the Magistrate's tape or even to have called it to his attention. In addition, petitioner raised yet again the commercial law defenses which had been previously rejected by the Second Circuit on the appeal of his co-defendants, and which he now brings before this Court.

Oral argument was scheduled and counsel for the parties came on to be heard. The Court of Appeals, however, having determined that the record before it was unclear as to the scope of Judge Conner's review, limited counsels' oral argument and by its

order dated December 11, 1981, remanded the action to Judge Conner for a statement as to whether he had listened to Magistrate Washington's tape recording of the proceedings (P. A-5).

On December 23, 1981 Judge Conner issued his Statement on Remand (P. B-1). Although Judge Conner acknowledged in his statement that he had not listened to Magistrate Washington's recording, he also set forth the scope of his review on the service issue and the reasons therefor. He pointed out that both parties had declined to have a transcript made of the proceedings, and that the Magistrate had made the tape recording for her own use. He further stated that Magistrate Washington's customary practice is to preserve recordings of proceedings from 10 to 20 days after issuing her recommended decision in order to allow parties sufficient time to file objections pursuant to 28 U.S.C. § 636(b)(1). As Judge Conner explained, "Because the objections filed by defendant-appellant did not contain a request that the Court listen to the tape recording or that the tape recording be made part of the record, [Magistrate Washington] feels sure that, in accordance with her customary practice, she erased the tape not later than about 20 days after February 10, 1981 (and before I began review of the relevant materials in preparation for my decision of April 6, 1981)" (P. B-3). Finally, Judge Conner confirmed that petitioner had never suggested that he listen to the tape recording, but instead requested that he make a *de novo* determination *either* after a second evidentiary hearing *or* on the basis of the affidavits submitted by petitioner and Lebow and that, in accordance with this request, his *de novo* determination was based upon the affidavits.

The Court of Appeals summarily affirmed Judge Conner's decision on April 5, 1982 (Moore, C.J., Timbers, Van Graafeiland) (P. A-1), and petitioner subsequently moved to vacate the judgment and reschedule argument before the Second Circuit. That motion was denied on May 20, 1982. Petitioner now asks this Court to grant its request for further review.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The District Court's *de novo* determination, based on a review of the Magistrate's findings and petitioner's affidavits, was proper where the record demonstrates that petitioner did not seek and in fact made impossible any review of a "complete record."

Petitioner seeks review of the question of whether, where a party has objected to the findings of a Magistrate, 28 U.S.C. § 636(b)(1) of the Federal Magistrates Act requires a district court, "in the absence of *any record*, to rehear the testimony." Petition at (i) (emphasis added). This question is academic, for it is simply not presented by the facts of this case. Indeed, the record demonstrates that petitioner's argument is entirely contrived: it was petitioner who purposefully dispensed with a transcript of the proceedings, petitioner who preferred to provide the Court with his own affidavits summarizing the proceedings, and petitioner who sought *and received* a *de novo* review based upon his affidavits—the very procedure he now argues is inadequate. Under these circumstances petitioner's manufactured issue does not merit review by this Court.

Petitioner's course of conduct makes clear that his strategy at every stage of the proceedings relating to the service issue was to deny the District Court, or any other court, the opportunity to review a "complete record" of the hearings before the Magistrate. As Judge Conner has pointed out in his Statement on Remand, at the very commencement of the hearings petitioner's counsel expressly waived the opportunity to have a stenographic transcript made. Furthermore, even though petitioner knew that Magistrate Washington had made a tape recording of the proceedings for her own use, petitioner's counsel failed to refer the District Court to this tape or even to mention it when he sought review of the Magistrate's findings on February 20, 1981. Precisely because petitioner's objections did not refer to the recording, Magistrate Washington erased the tape 10 or 20 days after

she issued her recommendation. Thus the only record of the proceedings in which the Magistrate had found petitioner's testimony incredible was lost.

Petitioner argues that in the absence of any "complete record" (by which he presumably means a transcript or tape recording), the District Court was required to rehear the testimony presented before the Magistrate. However, that position directly conflicts with the scope of review he sought from the District Court. After petitioner had objected to the Magistrate's findings, he submitted to the District Court his own five-page affidavit and a three-page affidavit of counsel. According to the letter accompanying these affidavits, the affidavits "set forth the substance of what was testified to with respect to the issue of personal service" and were submitted in order to provide the District Court with a basis for its review "in the event the Court does not wish to hear further oral testimony" (B-1,2). As Judge Conner's Statement on Remand makes clear, the District Court adopted petitioner's suggestion and based its review on the affidavits, which presented petitioner's case in its most favorable light (P. B-4). It was only after Judge Conner had found "wholly reliable" the Magistrate's findings that petitioner argued that a determination on the basis of the affidavits was improper. *American Express International Banking Corporation v. Sabet*, 512 F. Supp. 472, 474 (S.D.N.Y. 1981).

Under these circumstances, Judge Conner's review was entirely consistent with the requirements of the Magistrates Act. In *United States v. Raddatz*, 447 U.S. 667, 674, *reh'g denied*, 448 U.S. 916 (1980) this Court expressly stated that there is no requirement that a district court rehear the testimony presented to a magistrate in order to make a proper *de novo* determination under 28 U.S.C. § 636(b)(1). Moreover, the Fifth Circuit has ruled that a trial judge need not have a complete transcript of the proceedings for a proper *de novo* review if "the parties stipulate otherwise." *United States v. Lewis*, 621 F.2d 1382, 1387 (1980), *cert. denied*, 450 U.S. 916 (1981). Here, petitioner effectively waived a review of a complete record by declining his

right to a transcript, proferring to the District Court his own version of the testimony and suggesting that the court's review be based on his submissions.

The suggestion in the Petition that the District Court relied solely on the Magistrate's Report in making its review is contradicted by the record. The opinion of April 6, 1981 demonstrates that the court's decision was hardly a "rubber-stamp" approval of the Magistrate's findings. In accordance with petitioner's request, Judge Conner clearly gave careful consideration to each of petitioner's affidavits and correctly found that much of the testimony contained therein was not inconsistent with the process server's version of events (P. B-22-25). As to the credibility of petitioner's denial of service, the Court ultimately chose to adopt the finding of the Magistrate, who had the benefit of observing the demeanor of the witnesses. In so doing, Judge Conner was simply applying the principle set forth in *Raddatz* that a district judge may place "whatever reliance . . . in the exercise of sound judicial discretion" he chooses on a Magistrate's proposed findings and recommendations. 447 U.S. at 676.[7]

The Court of Appeals could not have done otherwise than to affirm the adequacy of Judge Conner's review. To require, as petitioner urges, that the District Court conduct a second hearing under the circumstances of this case would completely defeat the objective of the Magistrates Act, which is to alleviate the congestion of litigation in the district courts. *See United States v. Raddatz, supra*, 477 U.S. at 676 n.3. Moreover, such a rule would provide unscrupulous parties with a blueprint for abuse of the judicial process. Any party could *guarantee* itself an entirely new hearing on demand by simply following petitioner's course of action and not requesting that a transcript be made of the proceedings before the Magistrate. Finally, fundamental concepts

7. Where the issue is primarily one of credibility, as it is here, this Court has indicated that it is particularly appropriate for the district judge to rely on the Magistrate's findings: "To construe § 636(b)(1)(C) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts." *Id.* at n.3.

of judicial fairness prohibit overturning the District Court's findings where, as here, petitoner's counsel actually suggested the standard of review which he now argues resulted in error. *See State v. Tudor*, 154 Ohio St. 249, 95 N.E.2d 385 (1950).

2. Petitioner's claim that United States courts lack jurisdiction over AEIBC's claim against him is based on an unsupportable misreading of the Iran-United States Hostage Agreements.

Petitioner also argues that the Iran-United States Hostage Agreements divested the federal courts of jurisdiction over AEIBC's claim against him. This exact claim has already been presented by petitioner and rejected by this Court in *Republic National Bank v. Sabet*, No. 79 Civ. 4290 slip op. (2d Cir. March 27, 1981), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 18, 1982) (No. 81-1767). Petitioner's recapitulation of the argument here presents no grounds for this Court to reconsider its earlier decision.

The sole purported authority for petitioner's argument is the following provision of the Hostage Agreements (emphasis added):

> An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding *claims of nationals of the United States against Iran and claims of nationals of Iran against the United States*, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or banking guarantees), expropriations or other measures affecting property rights . . . .[8]

8. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981 (the "Hostage Agreements"), Article II(1).

Petitioner urges this Court to rule that this provision establishes the Iran-United States Claims Tribunal as the exclusive forum for the resolution of AEIBC's claims against him and that it ousts the federal courts of jurisdiction over this action.

The argument is simply nonsense. The provision plainly confers *no jurisdiction at all* on the Claims Tribunal over AEIBC's claim against petitioner. The Tribunal is granted jurisdiction over (a) claims of United States nationals against *Iran*, and (b) claims of Iranian nationals against the *United States*. But this case involves only a claim by a United States national, AEIBC, against an Iranian national, Hormoz Sabet. A claim by a national of the United States against a *national* of Iran clearly does not fall within the jurisdiction of the Claims Tribunal.

Indeed, it could hardly be otherwise. The very purpose of the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981 (the "Algerian Declaration") is the termination of "all litigation as between the *Government* of each party and the nationals of the other . . . ." Algerian Declaration, General Principles (B) (emphasis added). The United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against *Iran and its state enterprises*. . . ." *Id.* (emphasis added). Obviously, Hormoz Sabet is neither "Iran" nor "its state enterprises."[9]

The explanation which accompanied the Hostage Agreements upon their transmittal to Congress by the Department of State reveals that the State Department has a similar understanding of the jurisdiction accorded the Claims Tribunal:

> The claims settlement agreement establishes the Iran-U.S. Claims Tribunal for the purpose of deciding (1) claims of U.S. nationals against Iran, (2) claims of Iranian nationals against the United States, and (3) certain claims of the United States and Iran against each other.

United States Department of State, Selected Documents No. 19, "Hostage Agreements Transmitted to Congress," March 12, 1981, at 2. There is not a shred of support in the Hostage

9. Hormoz Sabet, as an Iranian national, cannot be considered "Iran" even under the expansive definition accorded that term in Article VII(3) of the Hostage Agreements.

Agreements, or the Executive Orders promulgated thereunder, that those agreements, and the claims settlement machinery which they establish, encompass a claim by a United States *national* against an Iranian *national*. *See also* United States-Iran Agreement on Release of the American Hostages, Message to Congress, January 19, 1981, Administration of Jimmy Carter 3041 ("There will be established an international tribunal to adjudicate various disputed claims by U.S. nationals against Iran. . . .").

Nor does anything in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) suggest a different result. *Dames & Moore* assumed without discussion that the Hostage Agreements apply only to claims by United States institutions against Iran and its state enterprises. *Id.* at 660, 665, 675. It also held that the Hostage Agreements did not detract from the jurisdiction of the lower federal courts. Indeed, *Dames & Moore* expressly recognized that claims not explicitly relegated to the Tribunal would be tried in United States courts:

> [W]e do not believe that the President has attempted to divest the federal courts of jurisdiction. . . . As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts.

Id. at 684. The federal courts are not divested of jurisdiction over claims which cannot be presented to the Claims Tribunal.

In fact, the Tribunal has already ruled (by a 6 to 3 vote) that despite Iran's contention to the contrary, the Claims Tribunal has no jurisdiction over claims of Iran against nationals of the United States. *Case A/2*, rendered December 21, 1981, *reprinted in Iranian Assets Litigation Reporter* 4,278-83 (February 19, 1982). The Tribunal said:

> It can easily be seen that the parties set up very carefully a list of the claims . . . which could be submitted to the arbitral tribunal . . . They knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.

Id. at 4,279. *A fortiori*, if Iran cannot take its claim against a national of the United States before the Claims Tribunal, then a national of the United States cannot pursue there its claim against a national of Iran.

3. The commercial law issues raised by petitioner are without merit.

Petitioner's final question presented for review takes issue with the District Court's reading of a technical question of New York commercial law which accords in every respect with the applicable provisions of the Uniform Commercial Code, principles of common law and the decisions of every court which has considered the matter. *Such an issue is plainly not appropriate for presentation to the Supreme Court of the United States, and the Petition contains no suggestion whatsoever why this Court should accept it for review.*

Petitioner argues that he should be discharged from his undisputed liability on the Notes by AEIBC's alleged satisfaction of the obligations by resort to the Pledged Shares owned by Firooz and Iramoz and/or by AEIBC's alleged impairment of the collateral. The District Court determined that these defenses were not available to any of the co-makers of the Notes, including petitioner, because as primary obligors with no right of recourse against the collateral they were not sureties and thus lacked standing to assert collateral-related defenses (P.B-49-53, 512 F. Supp. at 469, 471). Petitioner appealed Judge Conner's finding to the United States Court of Appeals for the Second Circuit, where it was summarily affirmed (P. A-1).[10]

10. The issue had previously been presented to the Second Circuit by petitioner's co-defendants in their appeal of the District Court's decision. In its Summary Affirmance dated May 4, 1981, the Second Circuit agreed with the District Court:

> Judge Conner determined, and we believe correctly, that those provisions [of the Code asserted by defendants] do not cover a non-owner obligor whose obligation is independent of the pledgor's and who has no right of recourse against the collateral whatsoever. (A-3).

The District Court's holding is an accurate statement of New York law. The Notes are commercial instruments and as such the discharge of parties thereto is governed exclusively by the provisions of Article 3 of the New York Uniform Commercial Code ("Code"). Code § 3-601. Discharge by payment or satisfaction is governed by Code § 3-603, which states that *only* the party who actually pays or satisfies the holder is entitled to discharge from his liability on a note.[11] Thus as a co-maker of the Notes, petitioner remains unconditionally liable to the holder of the Notes until such time as he makes payment.

The result under common law is to the same effect. As non-party pledgors of collateral to secure the obligations of the Sabets, Firooz and Iramoz are sureties. *Cross v. Allen*, 141 U.S. 528, 534 (1891); Restatement of Security § 36(1). It is elementary that at common law payment or satisfaction by a surety does not discharge the maker's obligation to the holder of the note.[12] *Assets Realization Co. v. Mercantile National Bank*, 167 A.D. 757, 153 N.Y.S. 156 (1st Dept. 1915) ("payment of a note in whole or in part by one secondarily liable thereon does not discharge the liability of the maker."); *Madison Square Bank v. Pierce*, 137 N.Y. 444, 33 N.E. 557 (1893).

Similarly, under the Code the defense of discharge of a party to an instrument by reason of impairment of collateral pledged by another is available only if such party has a right of recourse

11. Code Section 3-603 states in relevant part:

> The liability of any party is discharged to the extent of *his* payment or satisfaction to the holder .... (emphasis supplied)

Paragraph 5 of the Official Comment to § 3-603 makes clear that payment by a third party does not discharge obligors who have no right of recourse against the payor.

12. Indeed, this principle is manifest in the very provision of New York General Obligations Law ("G.O.L.") cited by petitioner at page 23 of his Petition. G.O.L. § 15-103 expressly excepts from the requirement that payment by one co-obligor be credited to the obligation of another any payment by one who stands in the relation of a surety to the other obligors.

against the pledgor. Code § 3-606(1)(b).[13] Every court which has considered the question has held that the defense of impairment is not available to primary obligors who have no interest in or recourse against the collateral. *E.g., Commerce National Bank v. Baron*, 336 F. Supp. 1125 (E.D. Pa. 1971); *Oregon Bank v. Baardson*, 256 Or. 454, 473 P.2d 1015 (1970); *Wohlhuter v. St. Charles Lumber Co.*, 62 Ill. 2d 16, 338 N.E.2d 179 (1975). Although New York courts have not yet considered this issue, their decisions interpreting § 3-606 are consistent with the District Court's holding in this action. *See Mikanis Trading Corp. v. Block*, 59 A.D. 2d 689, 398 N.Y.S.2d 679 (1st Dept. 1977); *Beneficial Finance Co. v. Husner*, 82 Misc. 2d 550, 369 N.Y.S.2d 975 (Sup. Ct. Wayne Co. 1975).[14]

Petitioner does not dispute that he neither owns nor has any right of recourse against the collateral pledged to secure the Notes which are the subject of this action. Accordingly, petitioner's arguments are without merit and present no issues worthy of consideration by this Court.

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13. Section 3-606(1)(b) provides that:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> • • •
>
> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

Official Comment 1 to § 3-606 explicitly states that:

> The suretyship defenses here provided . . . are available to *any party who is in the position of a surety, having a right of recourse* either on the instrument or dehors it, including an accommodation maker or acceptor known by the holder to be so.

14. Petitioner cites *Indianapolis Morris Plan v. Karlen*, 28 N.Y.2d 30, 319 N.Y.S. 2d 831 (1971) in support of his claim that AEIBC's alleged impairment of collateral entitles him to discharge. As the Second Circuit confirmed in its summary affirmance of AEIBC's judgment against petitioner's co-defendants:

> The language [in *Karlen*] relied upon by defendants is dictum and, in any event, *does not* support their contention that a non-owner obligor is discharged upon the impairment of collateral against which he has no right of recourse. (A-3).

CONCLUSION

For the foregoing reasons, the Petition of Hormoz Sabet for a Writ of Certiorari should be denied.

Dated: New York, New York
August 3, 1982

Respectfully submitted,

JOHN F. PRITCHARD
Attorney for Respondent
American Express International
Banking Corporation
WINTHROP, STIMSON, PUTNAM &
ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

Of Counsel:

DAVID J. LONG
ROY L. SMART

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the Fourth day of May, one thousand nine hundred and eighty-one.

Present: HONORABLE LEONARD P. MOORE,
HONORABLE THOMAS J. MESKILL, *Circuit Judges*,
HONORABLE LLOYD F. MAC MAHON, *District Judge*.

Docket No. 80-9110

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION,

Plaintiff Appellee,

v.

HABIB SABET, IRADJ SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants,

HABIB SABET and IRADJ SABET,

Defendants-Appellants.

Appeal from a decision of the United States District Court for the Southern District of New York, Conner, J., granting the plaintiff summary judgment and confirming an order of attachment.

This cause came on to be heard on the transcript of record from the district court and was argued by counsel.

This action was instituted by the plaintiff to recover amounts allegedly due and owing on three loans made to the defendant Habib Sabet between 1977 and 1978. Co-defendants Iradj Sabet and Hormoz Sabet cosigned the notes tendered by Habib and additionally executed separate unconditional guarantees. The loans were also secured by corporate guarantees and collateral pledged by two corporations, Firooz and Iramoz, which were controlled by the Sabets until their expropriation by the Islamic Provisionary Revolutionary Government of Iran in 1979.

This diversity action was commenced in the Supreme Court of the State of New York, County of New York. An order of attachment was obtained on July 30, 1979 and while this action was still pending in state court, the plaintiff moved for summary judgment in lieu of complaint pursuant to N. Y. Civ. Prac. § 3213 (McKinney 1970). This action was removed to the district court pursuant to 28 U.S.C. § 1441 (1976) in August 1979. The district court granted the plaintiff's motion for summary judgment against Habib Sabet and Iradj Sabet and confirmed the order of attachment. Unresolved jurisdictional issues prevented the district court from entering judgment against the other two named defendants, Hormoz Sabet and Firooz Corporation.

The defendants assert on appeal the same defenses rejected by the district court below. First, the defendants contend that plaintiff unjustifiably impaired the collateral pledged by Firooz and that this conduct resulted in the defendants' discharge from their obligations on the loans pursuant to N. Y. U.C.C. § 3-606(1)(b) (McKinney 1964). Second, the defendants assert counterclaims under the pledge agreements and N. Y. U.C.C. §§ 9-504, 9-505, and 9-507 (McKinney 1964) which relate to the plaintiff's treatment of the collateral pledged by Firooz. And finally, the defendants make the alternative argument that Firooz was actually the real obligor on the notes, that they were merely accommodation parties to Firooz, and therefore, that the plaintiff's disposition of the collateral pledged by Firooz discharged them.

Judge Conner ruled below that the defendants were not accommodation parties but primary obligors and lacked standing to assert the defenses contained in §§ 3-606(1)(b), 9-207, and 9-507 of the Uniform Commercial Code. The district court determined that neither Habib or Iradj Sabet possessed any interest in the collateral that was pledged by Firooz and would have no right of recourse against the pledged stock. Judge Conner determined that the defenses contained in § 3-606(1)(b) are only available to parties who actually pledge collateral themselves or are in the position of a surety, having a right of recourse against the collateral that is alleged to have been impaired. Since the defendants

fell into neither of these categories their claim under that provision was rejected. We are satisfied that Judge Conner's decision in this regard was correct. The language contained in the New York Court of Appeals' decision in *Indianapolis Morris Plan v. Karlen*, 28 N.Y.2d 30, 34 (1971) (Breitel, J.), relied upon by the defendants is dictum and, in any event, *does not* support their contention that a non-owner obligor is discharged upon the impairment of collateral against which he has no right of recourse. The defendants' claims asserted under §§ 9-504, 9-505, and 9-507 of the Uniform Commercial Code were rejected on the ground that the rights under those provisions were available only to Firooz, the owner of the collateral. The district court acknowledged that under some circumstances a non-owner obligor has been permitted to assert rights under those provisions; however, Judge Conner determined, and we believe correctly, that those provisions do not cover a non-owner obligor whose obligation is independent of the pledgor's and who has no right of recourse against the pledged collateral whatsoever.

The remainder of the arguments advanced by the defendants are equally without merit and therefore we affirm the decision of the district court.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons contained in Judge Conner's opinion below.

/s/ LEONARD P. MOORE
Leonard P. Moore, U.S.C.J.

/s/ THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

/s/ LLOYD F. MACMAHON
Lloyd F. MacMahon, U.S.D.J.*

* Honorable Lloyd F. MacMahon, Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

B-1

[Letterhead of Coudert Brothers]

February 26, 1981

BY HAND

Honorable William C. Conner
United States District Judge
Room 129, United States Courthouse
Foley Square
New York, New York 10007

Re: American Express International Banking Corporation v. Habib Sabet, et al.

Dear Judge Conner:

On September 22, 1980, you referred the above-captioned action to Magistrate Ruth Washington for a hearing as to whether or not plaintiff had effected valid personal service upon defendant Hormoz Sabet. Thereafter, plaintiff requested, and you agreed to have the Magistrate also decide, whether valid substituted service had been effected. On February 10, 1981, Magistrate Washington issued her Report and Recommendation, finding that plaintiff had effected valid personal service, but had not effected valid substituted service upon defendant.

On February 20, 1981, defendant filed an affidavit of counsel setting forth his objection to the Magistrate's finding of valid personal service. As described therein, the Magistrate has misconstrued the testimony of defendant and his attorney, both of whom testified at the hearing. In that affidavit, defendant requested "a de novo determination" of the issue, as provided for in Title 28, United States Code Section 636(b)(1) and, in the alternative, requested that the Court hear the pertinent evidence itself, which it is estimated would require no more than ninety minutes. In the event the Court does not wish to hear further oral testimony, we submit herewith two brief affidavits which set forth the substance of what was testified to with respect to the

issue of personal service. These affidavits demonstrate conclusively that defendant was not and could not have been served personally on the afternoon of August 3, 1979, because he was never at the location at which service was alleged to have been made at *any* time that afternoon.

We remain prepared to present this brief testimony to the Court on the shortest of notice, but submit these affidavits in order to expedite this matter in the event the Court does not wish to take oral testimony. We believe the Magistrate's order to rest on a simple misunderstanding of the testimony presented, and urgently request the opportunity to clarify this matter. It is particularly important that defendant be afforded this opportunity, since your Honor has indicated your intention to grant summary judgment against him, thereby depriving him of any further opportunity to contest this or any other issue in the case.

Yours very truly,

/S/ JERRY L. SIEGEL
Jerry L. Siegel

JLS:gdd
Enclosure

cc: Winthrop, Stimson, Putnam & Roberts

INFORMATION CONCERNING AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION REQUIRED BY RULE 28.1 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

I. Parent company:

American Express Company

II. Significant subsidiaries (other than wholly owned subsidiaries):

Egyptian American Bank (Egypt)

The Bancom Group, Inc. (Philippines)

The Pacific Bank Berhad (Malaysia)

III. Significant affiliates (joint ventures):

Ultramex S.A.—Arrendamento Mercantile (Brazil)

Arrendadora Comercial—Amex, S.A. de C.V. (Mexico)

AMP— Amex Leasing Limited (New South Wales)